UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: **Operation of the Missouri River System Litigation**	)	No. 03-MD-1555 (PAM)
STATE OF MISSOURI, ex rel. Jeremiah W. (Jay) Nixon,	)	
vs.	)	**Civil No. 0:06-cv-01616-PAM**
UNITED STATES ARMY CORPS OF ENGINEERS, FRANCIS J. HARVEY, SECRETARY OF THE ARMY, UNITED STATES DEPARTMENT OF DEFENSE, and BRIGADIER GENERAL GREGG F. MARTIN	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF MISSOURI'S MOTION FOR SUMMARY JUDGMENT

SUMMARY OF ARGUMENT

The Federal Defendants' Memorandum in Opposition to Missouri's Motion for Summary Judgment ("FD Opp. Mem.") is most notable for what it does not say. Despite forty-eight pages of briefing now filed by the Corps, in addition to the thirty-seven pages of the EA,[1] the Corps has never said that the Revision[2] does not have a significant impact on the human environment. Nor

[1]Environmental Assessment for the Inclusion of Technical Criteria for Spring Pulse Releases from Gavins Point Dam (February 2006) ("EA") § 6.0 (Ex. 3088, 091351). All citations to the record are to the administrative record filed by the Corps, either in connection with this complaint or the prior multidistrict litigation, unless otherwise indicated.

[2]Missouri River Master Water Control Manual ("Master Manual"), Revision 1, Incorporation of Technical Criteria for Bimodal Spring Pulse Releases from Gavins Point Dam ("Revision").

does the Corps ever claim that the Revision is not a significant change to the Master Manual. The reason for the Corps' silence is simple: The Corps knows that the Revision is a substantial change that has a significant impact. That is why the Corps did not issue a finding of no significant impact ("FONSI"). Therefore, under the National Environmental Policy Act ("NEPA"), an environmental impact statement ("EIS") was required. The Corps cannot finesse this requirement by relying on the "range of impacts" of previously rejected spring rise alternatives.

> The Corps also fails to address its own NEPA regulations. These regulations state:
>
> An EA is a brief document which provides sufficient information to the district commander on potential environmental effects of the proposed action and, if appropriate, its alternatives, for determining whether to prepare an EIS or a FONSI (40 CFR 1598.9).

33 CFR § 230.10(a). They go on to state: "A FONSI shall be prepared for a proposed action, not categorically excluded, for which an EIS will not be prepared." *Id.* § 230.11. The Corps' regulations do not provide any exception to these clear and unambiguous mandates. Specifically, there is no provision whatsoever for the "range of impacts" approach the Corps employed here. It is not surprising, therefore, that the Corps chooses not to address its own regulations in its extensive briefing in this case.

Instead of addressing these critical issues, the Corps makes what is basically a three pronged argument. First, it claims the standards for determining when to issue a supplemental environmental impact statement ("SEIS") are different from the standards applicable to an EIS. FD Opp. Mem. at 3-6. This argument is not supported by the law. While a few courts have not

always required a FONSI when an SEIS is not prepared, those courts have only done so in extremely limited circumstances not applicable in this case.

Second - the Corps contends - even if there are not different standards for an SEIS, the changes made by the Revision really are not all that significant. FD Opp. Mem. at 6-11. This argument is not supported by the facts. Even if the Corps were correct on this issue, the regulations would still require issuance of a FONSI in accordance with procedures contained in the regulations. The Corps did not do so because it cannot reasonably claim that the Revision will not have a significant impact on Missouri River management. The Revision provides for a bi-modal spring rise that is unlike anything that has been done by the Corps in its prior management of the river. The EA establishes that the Revision decreases benefits from the Master Manual in eight of fifteen categories. Ex. 3088, 091332-39. And, if the *post hoc* rationalizations of counsel in the Corps' briefs were true, there is no rational explanation as to why the Corps did not issue a FONSI and comply with the clear mandate of its own regulations and NEPA.

Third, the Corps argues that, even if it applied the wrong standards and the Revision was significant, its *ad hoc* Plenary Group/annual operating plan process satisfies NEPA requirements. FD Opp. Mem. at 16-19. This is not supported by the law or the facts. The NEPA regulations are quite specific about the steps needed to comply. They do not provide an exemption for processes that the agency thinks are just as good as the processes prescribed by regulation. Moreover, the process devised by the Corps did not provide an equivalent opportunity to the public to consider the Corps' analysis and decision-making. Instead, invited participants were provided a limited opportunity to have limited input, largely ignored, before the Corps developed a plan, but no

member of the public was given any opportunity to review or comment on the Corps' final plan and analysis prior to implementation. This is not just as good as NEPA procedures.

I. THE LAW MAKES NO DISTINCTION BETWEEN THE PROCESS REQUIRED FOR AN EIS OR AN SEIS.

The Corps' NEPA-implementing regulations provide no special procedures for an SEIS, but on their face unambiguously apply to the decision to issue any EIS, whether original or supplemental. Nor do the Council on Environmental Quality ("CEQ") regulations make such a distinction. Draft, final, and supplemental statements are all addressed in a single rule. 40 CFR § 1502.9. The regulation specifically states that an agency:

> Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

Id. The plain language contemplates that an EIS and an SEIS will be treated the same in all significant respects.

Nevertheless, the Corps turns to "well-established case law" it claims allows an agency to use "a variety of methods" to comply with NEPA. FD Opp. Mem. at 4. The cases it cites in support do not establish any such thing, especially as applied to the facts in this case.

In *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851 (1989), identified by the Corps as the "seminal Supreme Court case on supplemental NEPA work" (FD Opp. Mem at 4), the Court addressed a claim that new information required an SEIS. *Id* at 1856. The Corps' had issued a supplemental information report ("SIR") stating that further NEPA documentation was not required. *Id.* at 1862. The Court did not address whether a FONSI was issued or was

required, although it did discuss the reasoning in the SIR and sustained the Corps' decision not to issue an SEIS. *Id.* at 1862-65.

At the time *Marsh* was decided, the Corps' NEPA-implementing regulations had a specific provision that allowed use of an SIR when new information did not require issuance of an SEIS. *Id.* at 1862 & n.26. The Corps' regulations no longer contain such a provision; the current equivalent section now refers only to FONSIs. *Compare* 33 CFR § 230.11 (1987) *with* 33 CFR § 230.11 (2005).

Furthermore, the Court's decision was limited to a situation in which new information becomes available after the EIS was complete. 109 S. Ct. at 1858-59 & nn.16, 17. The regulations, both then and now, also require an SEIS when the agency makes substantial changes in the proposed action that are relevant to environmental concerns. *Id.*; 40 CFR § 1502.9(c)(1)(i). Neither *Marsh* nor any of the other cases cited by the Corps allows the use of an SIR or any other alternative means of complying with the regulations when the issue involves substantial changes in the proposed action.

In addition to *Marsh*, the Corps cites only two Ninth Circuit cases to support its claims that "well-established case law" allows it to ignore its own regulations. FD Opp. Mem. at 4. In *Idaho Sporting Congress Inc. v. Alexander,* 222 F.3d 562 (9th Cir. 2000), the United States Forest Service issued four logging permits. Two permits were issued after issuance of an EA and a FONSI and two were issued after issuance of an EIS. Subsequent to issuance of those permits, the Ninth Circuit found in a separate case that similar EISs were inadequate. Idaho Sporting Congress Inc. ("ISC") then filed suit to block additional timber sales under the permits. *Id.* at 564.

ISC and the Forest Service settled the initial action by agreeing that the Service would prepare SIRs to determine if additional NEPA compliance was necessary, with ISC reserving the right to challenge that determination in a subsequent lawsuit. When the SIRs were issued with a finding that no additional NEPA documentation was required, ISC again filed suit. *Id.* at 564-65.

The complaint was based solely on the claim that new information required an SEIS; there was no change in the proposed action. *See id.* Despite this fact, and the fact that SIRs were used by express agreement of the parties, the court denied the use of an SIR. *Id.* at 567-68. The court warned that an SIR could be used only in very limited circumstances to determine the significance of new information, but could not supplant other NEPA documentation. *Id.* at 566. The court further emphasized that NEPA requirements regarding timing, notice, and comment were crucial to the efficacy of NEPA's procedural safeguards and could not be avoided by use of non-NEPA procedures. *Id.* at 567-68. Thus, this case does not support the Corps' position here, but instead reinforces Missouri's main argument: When the Corps proposes significant action, it must issue either a FONSI or an EIS as the rules require.

The second Ninth Circuit case cited by the Corps, *Laguna Greenbelt, Inc. v. U.S. Department of Transportation,* 42 F.3d 517 (9th Cir. 1994), is limited by its facts to a situation in which new information arises after issuance of an SEIS, not to a change in the proposed action. Id. at 529-30. So, too, is *Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984), cited later in the Corps' opposition (FD Opp Mem. at 5).[3] Therefore, none of the "well-established case law"

[3]In its discussion of these cases, the Corps does its best to create the impression that they apply even when there is a significant change in the proposed action. See FD Opp. Mem at 4 (suggesting that *Marsh* and *Idaho Sporting Congress* apply to change in action); *id.* at 5 (suggesting that *Wisconsin v. Weinberger* applies to change in action); *id.* at 5-6 (suggesting that *Marsh* applies to a change in action). As a review of the cases and the discussion above

cited by the Corps applies to a situation in which the agency makes a substantial change to the proposed action, such as the addition of an unprecedented spring rise.[4]

It makes sense that the courts might apply a relaxed standard when the issue is new information. New information arises repeatedly on every project. An agency would be paralyzed into inaction if it needed to prepare an EIS or FONSI every time new information came up, but that is not this case.

The same considerations do not apply when an agency is proposing a substantial change to proposed action, an event wholly within the control of the agency. No court has extended relaxed standards to a situation in which the agency makes substantial changes to a proposed action. Missouri's claim is predicated on both significant changes to the Master Manual and new information. Complaint ¶¶ 25, 28, 29. Therefore, even if the court were to adopt a relaxed standard for an SEIS when the issue was new information, that would not defeat Missouri's motion for summary judgment.

II. THE REVISION IS A SUBSTANTIAL CHANGE TO THE MASTER MANUAL THAT HAS A SIGNIFICANT IMPACT ON THE HUMAN ENVIRONMENT.

The Corps' second argument highlights the unique context of this case. All of the cases cited by the Corps involve arguments about whether the agency correctly concluded that new information did not require the filing of an EIS. The context of this case is markedly different.

---

demonstrate, none of these cases may fairly be read to extend to a substantial change to a proposed action.

[4]The Corps also cites *Arkansas Wildlife Federation v. U.S. Army Corps of Engineers*, 431 F.3d 1096 (8th Cir. 2005), in support of its argument. That case was distinguished in Missouri's Memorandum in Opposition to Federal Defendants' Motion for Summary judgment at pages 4 to 5, and so will not be addressed here.

The Corps prepared an EA, thereby acknowledging that NEPA applies to the Revision. Under the Corps and CEQ's regulations, the EA's sole purpose is to provide sufficient information to allow an informed decision whether to prepare an EIS or to issue a FONSI. 33 CFR § 230.10; 40 CFR § 1508.9. An EIS must be prepared when federal action significantly affects the human environment. 42 U.S.C. § 4332(C). An SEIS must be prepared when the agency makes substantial changes in a proposed action or there is significant new information relevant to environmental concerns. 40 CFR § 1509(c)(1). If an EIS or SEIS is not prepared, the agency must issue a FONSI stating that the proposed action will not have a significant effect on the human environment. 40 CFR § 1508.13; 33 CFR § 230.11.

Reading these provisions together, the Corps must prepare an EIS or an SEIS if the Revision:

1. Significantly affects the human environment;

2. Is a substantial change in the Master Manual that is relevant to environmental concerns; or

3. Is based on or presents significant new information relevant to environmental concerns.

If the Corps finds that none of these conditions apply, it must prepare a FONSI stating that the Revision will not have a significant effect on the human environment.

What makes this case unique is that the Corps refuses to state that the Revision will not have a significant effect on the human environment or that it is not a substantial change to the Master Manual that is relevant to environmental concerns. The Corps does not make these statements because it knows they are not true. None of the cases discussed in the briefs by either party present this situation. As noted above, in some cases that is because the case involved new

information rather than action. While there is significant new information in this case, the crux of the Corps' proposal is action - the spring rise. In all cases involving proposed action, the agency has always gone on record that the proposed action does not have a significant impact on the human environment. *See, e.g., Arkansas Wildlife Federation*, 431 F.3d at 1099; *Sierra Club v. U.S. Army Corps of Engineers,* 295 F.3d 1209, 1218 (11th Cir. 2002).

Instead, the Corps goes to great lengths, five full pages in the current brief (FD Opp. Mem. at 6-11), to minimize and obscure this core issue. The Corps principally argues that no EIS is necessary because the impacts of the Revision are within the range of impacts previously studied. Quite simply, in the context of the clear and unambiguous language of NEPA and its implementing regulations, that assertion is irrelevant. It does not address whether the Revision significantly affects the human environment or constitutes a substantial change to the Master Manual relevant to environmental concerns. Furthermore, the Corps has yet to explain how alternatives it previously found unacceptable have been transformed into the gold standard by which all other plans should be judged.

In its current brief, the Corps goes a step further to argue that the Revision is so minor that it does not constitute a substantial change. *Id.* at 7, 9. As Missouri's initial memorandum in support of its summary judgment makes clear, Missouri does not agree with the Corps' factual assertions. MO Mem. at 7-10. It is not necessary or appropriate to engage in detailed rebuttal at the summary judgment stage, however, particularly because the contention that the action is not substantial is found only in counsel's argument. It is not in the record, and it is most definitely not in the EA. Whether the Corps *could* have concluded that the Revision was not substantial is

not before the Court. The Corps *did not* make that finding: If it had, it would have issued a FONSI.

The only case cited by the Corps in support of this argument is *Sierra Club v. U.S. Army Corps of Engineers.* FD Opp. Mem. at 9. In that case, the Corps issued a FONSI when it determined that an EIS or SEIS was not necessary, which shows the Corps knows the proper procedure. 295 F.3d at 1218. The fact that it did not follow that procedure in this case can only mean the Corps concluded that it could not honestly issue a FONSI for the Revision.

Adding insult to injury, the Corps claims that this Court previously rejected a similar argument made by Missouri. FD Opp. Mem. at 10. The Court did no such thing. The argument the Corps cites was not made by Missouri but by two other parties in the multi-district litigation. *In re Operation of the Missouri River System Litigation,* 363 F. Supp. 2d 1145, 1164-66 (D. Minn. 2004), *aff'd*, 421 F.3d 618, 625 (8th Cir. 2005), *cert. denied, North Dakota v. U.S. Army Corps of Engineers,* 126 S. Ct. 1879 (2006), *Nebraska Public Power District v. U.S. Fish & Wildlife Service*, 126 S. Ct. 1880 (2006), *North Dakota v. U.S. Army Corps of Engineers*, 126 S. Ct. 1568 (2006). Furthermore, the argument presented was many orders of magnitude different from the Corps' position in this case. In the prior case, this Court held that a flow plan providing for 25 Kcfs did not require an SEIS because the Corps had studied flow plans of 21 Kcfs and 28.5 Kcfs. *Id.* In the current litigation, the Corps contends that it can adopt virtually any flow plan because it has previously studied - and rejected - everything from run of the river with no Corps management to no change from the prior Master Manual. The rule of reason previously applied by the Court cannot be stretched to encompass such unfettered latitude.

III. THE LIMITED CONSULTATION THE CORPS SEEKS TO SUBSTITUTE FOR REQUIRED NEPA PROCEDURES IS NOT AUTHORIZED BY LAW AND DOES NOT PROVIDE EQUIVALENT PROTECTIONS.

The NEPA-implementing regulations are very specific about the form, content, and timing of an EIS, 40 CFR Part 1502, and about the process for public comment, *id.* Part 1503. The regulations do not provide an agency discretion to ignore the regulatory requirements and develop a process the agency believes is just as good as the NEPA-mandated process. Compliance with the NEPA process ensures that NEPA's policy goals are met. *Idaho Sporting Goods,* 222 F.3d at 567.

Nevertheless, the Corps contends that its Plenary Group/Draft Annual Operating Plan ("AOP") process is as good as NEPA and should be accepted as a substitute. FD Opp. Mem. at 16-19. The Corps is wrong on both counts.

The Plenary Group, which was by invitation only and not open to the public, had four meetings: The first, on June 1 and 2, 2005, was strictly organizational (Ex. 2846); at the second, on June 29-30, 2005, the group concluded it needed more information before it could provide meaningful input (Ex. 2877, 086600); the record of the third meeting, held July 25-28, 2005, is largely incomprehensible, but it appears a number of reports were presented (Ex. 2906); and the fourth, on August 19, 2005, consisted of a largely unsuccessful attempt to develop a consensus on technical criteria for the spring rise (Ex. 2935). The scope of these meetings was limited from the outset. *See, e.g.*, Ex. 2846, 086242. The Corps did not present any proposed action, nor any analysis of a proposed plan, that Missouri or anyone else could comment on.

Two months later, on October 24, 2005, the Corps released its Draft 2005-2006 AOP together with a separate document it called the Draft Spring Pulse Water Control Plan Technical

Criteria ("Pulse Plan"). Ex. 2963. The Pulse Plan consists of a five page presentation of the bare bones criteria for the spring rise. *Id.* at 087917-21. The Draft AOP has even less information regarding the spring rise criteria. *Id*. at 087937-38. Neither document contains sufficient information to allow meaningful comment on whether the Corps adequately analyzed the effects of the plan and properly considered all of its effects on the human environment. The EA was released the day before the first scheduled spring rise; no comments were solicited (Ex. 3088) - or welcome (*see* FD Opp. Mem. at 17). The process the Corps now touts as being as good as NEPA simply was not.

IV. THE TECHNICAL SHORTCOMINGS OF THE EA DEMONSTRATE THE VALUE OF COMPLYING WITH NEPA PROCEDURES

In Point III of its initial memorandum in support of this motion, Missouri demonstrated some of the problems caused by the Corps' failure to follow proper NEPA procedures. MO Mem. at 17-20. Missouri only alleges one of these shortcomings constitutes new information that requires preparation of an SEIS - the Corps' failure to address the U.S. Department of Agriculture's decision not to provide crop insurance for losses due to the spring rise. Complaint ¶ 29. The Corps presents a long exegesis of letters from the Corps to the USDA and back in an attempt to suggest that the USDA has changed its position. FD Opp. Mem. at 15. Reading the documents the Corps relies on, however, it is clear the USDA has not changed its position. Rather, the Corps has told the USDA that the Corps does not believe the spring rise will result in flooding unless it is combined with a natural weather effect. Based on that representation, the

USDA has stated that flooding in those circumstances would be covered. If the Corps is wrong, however, there is still no coverage. Ex. 3062, 090886.[5]

The Corps' assertions regarding flooding in the record and in its brief (FD Opp. Mem. at 7-8) provide Missouri and its citizens cold comfort. Water released from Gavins Point Dam takes approximately six days to reach Kansas City and eleven days to reach the confluence with the Mississippi River in St. Louis. Ex. 3088, 091757. Even the best weather forecasting is not reliable over such an extended period. If the Corps releases water from the dam and five days later an unexpected weather front drops several inches of rain on the basin, flooding may occur despite any precautions the Corps may take. And if the rainfall were not sufficient to cause flooding but for the spring rise, the USDA may take the position the losses are not covered. The Corps' claim of ignorance regarding how this may affect the human environment (FD Opp. Mem. at 8) is laughable.[6]

Despite the fact that Missouri has nowhere alleged that the remaining shortcomings constitute new information requiring an EIS, the Corps spends six pages attempting to refute each and every shortcoming. *Id.* at 10-16. As noted previously, a summary judgment motion is not the appropriate forum for airing detailed factual disputes. Moreover, the Court could find for the Corps on each of these points and Missouri would still prevail on its motion because the Corps has not followed required NEPA procedures. Nevertheless, a few points should be clarified.

---

[5]This after-the-fact bureaucratic haggling verifies that the Corps did not fully undrstand or investigate the consequences of its plan in its haste.

[6]The human environment includes economic effects when they are interrelated with natural or physical environmental effects. 40 CFR § 1508.14.

The EA states that navigation benefits increase over the Master Manual. Ex. 3088, 091335. For purposes of this motion, Missouri has assumed this to be true. Now the Corps seems to place special significance on this fact. *See id.* at 12-13. The EA, however, does not explain how the Revision can increase navigation benefits slightly when every other spring rise alternative substantially reduces navigation benefits. Ex. 3088, 091335. In fact, the EA affirmatively states that the Revision may shorten the navigation season. *Id*. at 091347. If this increase is as significant as the Corps' counsel believes it to be, this counterintuitive and self-contradicted disclosure certainly requires more analysis and explanation.

Despite the Corps' suggestion to the contrary (FD Opp. Mem. at 13), Missouri has not requested the Court to bar any spring rise.[7] Although Missouri opposes the spring rise concept as a matter of principle, the complaint and Missouri's motion are clear that the relief it seeks in this case is to require any such plan to comply with NEPA. In the context of the EA, Missouri suggests that any NEPA analysis should at least explain how the Revision, or any other spring rise plan the Corps might propose, fulfills the purported purpose of the plan - to benefit the pallid sturgeon. The Fish and Wildlife Service ("FWS") opinion on which the Corps relies concluded that some spring rise was necessary to avoid jeopardy to the pallid sturgeon. It did not, however, address whether the Revision - which the Corps admits was not previously analyzed (*id*. at 10) - meets the perceived needs. Therefore, "because FWS said so," does not constitute adequate NEPA analysis or disclosure.

---

[7]Missouri does not concede that the doctrine of *res judicata* would apply if it were contesting the need for any spring rise, nor does it concede that a spring rise is necessary to avoid jeopardy to the pallid sturgeon. Neither issue is currently before the Court. Furthermore, the Corps did not raise *res judicata* as an affirmative defense in its answer and it is, therefore, barred from raising it now. Fed. R. Civ. P. 8.

Finally, Missouri is confounded by the Corps' explanation of why it is accptable for the Corps to use incorrect depletion data in analyzing the effects of the Revision. *Id*. at 16. Stripped of jargon, the Corps seems to be saying that it does not matter if the data it used for modeling the effects of the Revision are wrong because, if they are, they have always been wrong. The relative consistency among its data sets may be all the Corps cares about, but Missouri and its citizens are far more interested in whether the Corps' projections are correct. It is intolerable that the Corps would premise its decision on data it knows is wrong merely to serve the hobgoblin of foolish consistency.

CONCLUSION

For the foregoing reasons, Missouri requests the Court enter a temporary restraining order and preliminary injunction enjoining the Corps from implementing the Revision or any other change to the Master Manual based on the "range of alternatives" in the FEIS without full NEPA compliance, award Missouri its costs and expenses incurred in this matter, and provide such further relief as the Court deems proper.

Respectfully submitted,
JEREMIAH W. (JAY) NIXON
Attorney General

/s/ William J. Bryan
Joseph P. Bindbeutel MO Bar No. 28656
William J. Bryan MO Bar No. 37711
H. Todd Iveson MO Bar No. 37650
Assistant Attorneys General

8th Floor, Broadway Building
P.O. Box 899
Jefferson City, MO 65102
Fax No. (573) 751-8796